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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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LARRY W. RADER,

*Petitioner,*

VS.

WISCONSIN BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY,

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT WITH APPENDIX

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## QUESTIONS PRESENTED

1. Was the petitioner, in the Wisconsin attorney disciplinary proceedings, denied his Fourteenth Amendment Constitutional right of due process where the Wisconsin Supreme Court, *ex parte*, in December 1984, after the record and briefing was concluded, without notice or hearing, or a bill of cost as required under Wisconsin law, and without cost evidence in the appellate record before it on review, adjudged sua sponte the petitioner to pay $9168.56* as and for costs of the disciplinary proceedings.

2. Was the petitioner, in the Wisconsin attorney disciplinary proceedings, denied his Fourteenth Amendment Constitutional right of due process because the applicable Wisconsin Supreme Court Rules are patently and flagrantly unconstitutional on their face as the (attorney) petitioner is, and de facto was, denied an impartial decisionmaker, the referee and the Wisconsin Supreme Court, who each had a personal or governmental stake in the outcome including awarding of their own referee fees and BAPR attorney fees, (an arm of the Wisconsin Supreme Court) and reimbursement of fiscal operational expenses of the Wisconsin Supreme Court and the BAPR only if they found against petitioner; and, wherein, said decisionmakers can not act impartially when its BAPR member attorney's law firm, administrator or board member misconduct was, and is, involved in the controversy before it?

3. Was the petitioner, in the Wisconsin 1984 attorney disciplinary proceedings, denied his Fourteenth Amendment

* An attorney for the BAPR has recently advised petitioner that the Chief Justice of the Wisconsin Supreme Court obtained the $9168.56 figure by having his clerk (secretly) call the secretary at the Board of Attorneys Professional Responsibility during the court's deliberations to ascertain the expenses on "their books" and then inserted the figure of $9168.56, so obtained, in the court's decision of December 21, 1984.

Constitutional right of due process wherein the Wisconsin Supreme Court considered in its decision a 1979 private reprimand, for recording a deed pursuant to a court order, involving a BAPR board member which was raised on cross appeal by the BAPR but not alleged in the complaint or tried before the referee, and which private reprimand was entered in 1979 without a valid hearing and without petitioner's consent contrary to SCR 21.09(2) and without right of any appellate defense or review?

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## STATUTES INVOLVED

**List of Statutes Involved**

Wis. Stat. 767.27 Disclosure of assets required

(1) In any action affecting the family, except an action to affirm marriage under s. 767.02(1)(a), the court shall require each party to furnish, on such standard forms as the court may require, full disclosure of all assets owned in full or in part by either party separately or by the parties jointly. Such disclosure may be made by each party individually or by the parties jointly. Assets required to be disclosed shall include, but shall not be limited to, real estate, savings accounts, stocks and bonds, mortgages and notes, life insurance, *interest in a partnership* or corporation, tangible personal property, income from employment, future interests whether vested or nonvested, and any other financial interest or source. . . .

* * *

(5) If any party deliberately or negligently fails to disclose information required by sub. (1) and in consequence thereof any asset or assets with a fair market value of $500 or more is omitted from the final distribution of property, the party aggrieved by such nondisclosure may at any time petition the court granting the annulment, divorce or legal separation to declare the creation of a *constructive trust* as to all undisclosed assets, for the benefit of the parties and their minor or dependent children, if any, with the party in whose name the assets are held declared the constructive trustee, said trust to include such terms and conditions as the court may determine. The court shall grant the petition upon a finding of a failure to disclose such assets as required under sub. (1). (Emphasis added)

SCR 22.19 Expense of the proceeding

The expense of the proceeding, including the fee or expense for a witness, reporter, clerk, sheriff and referee and counsel for the board shall be charged to the appropriation provided in section 20.680 of the statutes, approved by the fiscal officer of the supreme court.

SCR 22.20 Assessment of costs

The board or referee in a proceedings may assess all or part of the costs of the proceeding against the respondent. Costs are payable to the board.

SCR 22.01(6m) Definitions

In this chapter: * * *

(6m) "Cost" means the compensation and necessary expenses of referees, fees and expenses of counsel for the Board, a reasonable disbursement for the service of process or other papers, amounts actually paid out for certified copies of records in any public office, postage, telephoning, adverse examinations and depositions and copies, expert witness fees, witness fees and expenses, compensation and reasonable expenses of experts and investigators employed on a contractual basis, and any other costs and fees permitted by chapter 814 of the statutes.

SCR 11.02 Appearance by attorney

* * *

(3) Substitution of attorneys. No order for the substitution of an attorney for a party may be made without consent signed by the party and his or her attorney; or *for cause shown and upon such terms as shall be just*, and on such notice as the court or judge shall direct. (Emphasis added)

SCR 20.22 Preservation of confidences and secrets of a client

(1) Except when permitted under sub. (2), a lawyer may not knowingly:

* * *

(b) Use a confidence or secret of his or her client to the disadvantage of the client.

(c) Use a confidence or secret of his or her client for his or her advantage or advantage of a 3rd person, unless the client consents after full disclosure.

(2) A lawyer may reveal:

* * *

(b) Confidences or secrets when permitted under disciplinary rules or required by law or court order.

* * *

(d) Confidences or secrets necessary to establish or collect his or her fee or to defend himself or herself or employes or associates against an accusation or wrongful conduct.

SCR 20.36 Representing a client within the bounds of the law

(1) In his or her representation of a client, a lawyer may not:

* * *

(c) Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.

* * *

(2) A lawyer who receives information clearly establishing that:

(a) The lawyer's client has, in the course of the representation, perpetrated a fraud upon a person or tribunal *shall promptly call upon the client to rectify the same and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal.* (Emphasis added)

IN THE

# Supreme Court of the United States

FALL TERM, 1984

---

LARRY W. RADER,

*Petitioner,*

VS.

WISCONSIN BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY,

*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

Petitioner prays that a writ of certiorari issue to review the decision of the Wisconsin Supreme Court, dated December 21, 1984, suspending his license to practice law for a period of 90 days commencing February 1, 1985, and sua sponte, ex parte, imposing a judgment of cost of the disciplinary proceeding against petitioner in the amount of $9,168.56. The case is reported in *Disciplinary Proceedings against Rader*, 121 Wis.2d 410, 359 N.W.2d 156 (1984).

## JURISDICTION OF THE COURT

This court has jurisdiction pursuant to 28 USC Section 2101. On March 11, 1985, Justice Stevens extended the time for filing this petition to and including May 20, 1985. This petition was timely filed.

## STATEMENT OF THE CASE

This case arises out of the Decision of the Wisconsin Supreme Court of December 21, 1984, imposing discipline for

violating SCR 20.22(1)(b) and (c) for allegedly filing affidavits with the trial court in a divorce action in chambers on a motion for substitution of attorneys in order to obtain payment of his fees. Petitioner submits that the Decision of the Wisconsin Supreme Court grossly distorted the factual background, as did the findings of the referee, concerning what transpired relating to the filing of the affidavits by petitioner with the divorce court on the motion for substitution of attorneys in the divorce proceedings.

From the onset, it must be understood that involved in the substitution of attorneys is the law firm of Lonsdorf & Mallery, attorney Mallery (who abstained from the investigation) being a member of the BAPR investigating committee which conducted the investigation leading to the filing of the complaint against petitioner in these proceedings. Petitioner in his answer in the disciplinary proceedings, paragraph 20, (App. F, 19a) strenuously objected to the violation of his constitutional right of due process because he could not be accorded a fair and impartial hearing by reason of the involvement of the BAPR member firm in the controversy. At no time before the divorce court on the motion hearing for substitution of attorneys did the client and his new attorneys, Lonsdorf and Mallery, make any claim that there had been any threat to collect his fees associated with filing the affidavits in chambers. Petitioner sets out his version of the pertinent facts below to show that an impartial decisionmaker could and would have concluded that petitioner was fully justified in filing the affidavits and that the BAPR and that the Lonsdorf - Mallery law firm acted unethically and wrongfully in not (1) ascertaining the truth of said affidavit information, and, (2) proceeded without disclosing to the court the asset nondisclosure as required by law.

## PERTINENT FACTUAL BACKGROUND

Petitioner in 1980 - 1981 represented one Springer, the husband, in a divorce action. The divorce was complex as a substantial dispute arose over the value of a farm partnership ($600,000 vs. 1,000,000) with the wife charging concealment of assets including at trial that $7,000 was taken by her husband which he had hid in the freezer. During the divorce, respondent failed to report 44 heifers ($23,150), $28,200 timber and the trial further revealed $60,000 additional machinery not included in his appraisal and required financial statement filed with the Court under Wis. Stat. 767.27 three weeks prior to trial.

After the property award was entered Petitioner requested to see the 1980 partnership tax returns filed after the Trial as part of Springer's request to appeal and move for reconsideration of the alimony award. When petitioner raised suspicions concerning the courts decision and the asset disclosure Springer sought the advice of two other attorneys. He returned to petitioner's office in June with the tax depreciation schedule from which it appeared that approximately $29,000 of undisclosed assets had not been reported, as well as, the unaccounted 1/3 share of the client's cash reserve for the depreciation. When Petitioner advised Springer he would not proceed unless the information was explained or disclosed, Springer threatened him claiming, (for the first time in 15 months) overcharges and noncredit of payment on his account and left the office.

In July, 1981, the law firm of Lonsdorf, Mallery, Andraski, & Garske, S.C. of Wausau, Wisconsin, submitted to the petitioner a substitution of attorneys in behalf of Laverne Springer, which the judgment had been entered on June 16, 1981, but was granted March 11, 1981.

**The Client "Veiled" Threats**

Petitioner apprised Springer's new attorney, Lonsdorf, of the above firm, that he had recently become aware of marital assets which Springer had not disclosed, and, that he refused to pursue an appeal or other motions unless Springer explained or revealed the same; that Springer then threatened petitioner and made claims against him of improper charges and credits on his account. Rader advised Lonsdorf that he had reviewed his charges and credits monthly with Springer during the past 15 months and that there had been no complaint whatsoever until petitioner asked Springer to explain the asset nondisclosure. Petitioner requested Lonsdorf to disclose the nondisclosure of assets and also advised him that he would not be *intimidated* by Springer and wanted to know what the claimed (ruse) improper charges and credits were.

Attorney Lonsdorf claimed the assets did not have to be disclosed as it might "tip off" the judge and refused to disclose the asset and nondisclosure. Petitioner refused to deliver the stipulation on substitution and, a hearing was scheduled before the Court under SCR 11.02(2).

**Reliance on Accountant's Advice**

Because of Lonsdorf's position on the refusal to disclose, petitioner then obtained a confirming opinion from a certified public accountant (which directly contravenes the Wisconsin Supreme Court Decision of 12/21/84). Petitioner then prepared two affidavits relating to the non-disclosure and misuse of his office by client to conceal assets, and an affidavit relating to his fees and credits on the Springer account, and subsequently left the affidavits with a covering letter with the judge in chambers. Exhibit 4, Appendix C, 13a. The affidavit on the nondisclosure states: Exhibit 1, Appendix D, 15a.

> 3. That since the Springers have gone to Attorney Lonsdorf's office and in view of the questions raised, affiant has reviewed the depreciation schedule and deduction with an accountant in August, 1981. Said accountant has advised said affiant that the deduction creates a very "suspicious circumstance" and in all probability the partnership has "hid" approximately $29,000 from its 1980 assets; the accountant did, however, qualify it, saying that the only way a determination could be made would be if a balance sheet was prepared and a determination made as to the application of said amount to any partnership indebtness.

Lonsdorf went ex parte to the judge in chambers and requested the judge not to read the affidavits and then moved at the substitution hearing that they be sealed which the trial Court ordered. Petitioner requested at the substitution hearing that the affidavits be made part of record and that the Court address of the issue of the claim of improper charges and credits. At the substitution hearing neither Lonsdorf nor Springer made any complaint to the trial judge of any threat associated with the filing of the affidavits in chambers; (Ex. 6 Wisconsin Appeal record) this charge was first made after the petitioner charged both the BAPR and Lonsdorf with misconduct in not disclosing the affidavit information based upon the accountant's opinion. Petitioner reported said information to the Court under authority of SCR 11.02(3), 767.27(5), SCR 20.22(2)(d) and SCR 20.36(1) and (2). The divorce court ordered the substitution without addressing the issue.

**Judge Volke's Subsequent Decision Finding Fraud**

The BAPR proceeded against Petitioner without investigating the truth of the non-disclosure of assets by Springer, not withstanding that Springer had not denied the

allegations relating to the non-disclosure; and, notwithstanding, that Judge Volke, (a substituted judge) upon Lonsdorf's motion for reconsideration of judgment in 1982, had confirmed petitioner's opinion, again without Lonsdorf or the BAPR disclosing the information in the affidavits to the trial Court in the divorce matter or on appeal, by finding on 9/20/82: Appendix F, 19a (Ex. 19 Wis. Appeal Rec.)

> "Judging from the testimony of George Springer, the position of Laverne Springer taken in front of Judge Stevens that he did not store money, specifically $7,000 in the family freezer, has a somewhat rancid order to it. The child testified unequivocally that he had see his father store money in the freezer, in fact quite a bit of money. Yet, the testimony at the divorce from Laverne Springer was that no money was stored in the freezer, and presumably the petitioner's failure to prove that $7,000 was unaccounted for lessened the amount of the marital estate to be divided."

Petitioner has charged in the disciplinary proceedings that the BAPR knowingly allowed the Lonsdorf and Mallery law firm to proceed without determining the truth of petitioner's, or the CPA's, report—determination of non-disclosure of assets under Wis. Stat. 767.27 and the attorneys responsibility relating thereto; and that the BAPR did also knowingly concealed evidence which it knew supported petitioner's defense in the proceedings, including Judge Volke's decision of 9/20/82, and failed to investigate, let alone impartially, the involvement of its committee member's law firm.! (End of pertinent facts statement; record verification of the above appears in petitioner's brief on appeal before the Wisconsin Supreme Court in the disciplinary proceeding which record will be remitted to this court by the clerk of the Wisconsin Supreme Court, Appendix F, 19a.)

The fact that the Wisconsin Supreme Court Decision failed to discuss the involvement of the BAPR board or attorney members and its failure to disclose the fact that the uncontested affidavits were based upon the advise of a certified public accountant and, also, failed to analyze Judge Volke's independent finding of subsequent nondisclosure of assets, demonstrates the bias in the procedure employed by the Wisconsin Supreme Court and the Board of Attorneys Professional Responsibility, and supports the following reasons for granting the writ.

## REASONS FOR GRANTING WRIT OF CERTIORARI

A review of the Wisconsin Supreme Court Decision reveals the patent denial of due process in the Decision. In one breath the Wisconsin Supreme Court states that its decision is based only upon the record on appeal, but in the same Decision it awards $9168.56 in costs without any evidence of such costs, muchless notice, hearing or a bill of cost as hereinafter argued. Also, notwithstanding that the 1979 private reprimand was entered without consent or proper hearing and not raised before the referee, the Supreme Court Decision opens by acknowledging that petitioner had been previously disciplined in 1979 for recording a deed without making reference to the fact of the involved improper restriction of its BAPR member, Libman, (who claimed no interest in the property) and the fact that the deed was recorded pursuant to a court ordered judgment. (Appendix E, 17a) This conduct on the part of the Wisconsin Supreme Court is not only a violation of due process, but is, in itself, outrageous particularly where no ethical violation is involved.

The question that one has to seriously ask is why would the highest court in the State of Wisconsin utilized such im-

proper procedural tactics with respect to the taxation of costs and the reference to the 1979 private reprimand when it knew that both procedures violated due process and were unconstitutional. This modis operandi confirms the *unacceptable unconstitutional risk of bias* involved in the the Wisconsin Supreme Court disciplinary procedure. Let's examine each question presented in terms of the denial of petitioner's constitutional rights.

**General Review of SCR Procedure**

Under the Wisconsin Supreme Court Rules the Board of Attorneys is an arm of the Wisconsin Supreme Court and both the Board and the referee works for the Supreme Court. SCR ch. 21 and 22. After an investigation by a district committee of the BAPR, the BAPR can issue a private or public reprimand with the consent of the attorney without a hearing, or it can file a formal complaint with the Supreme Court. SCR 21.09. Upon filing a complaint with the Supreme Court, the matter is assigned to a referee who has the power of a judge. The case then proceeds as a trial to the court under the Wisconsin Rules of Civil Trial and Appellate Procedure, SCR 22.14, 22.17, 22.23. After the decision by the referee, pursuant to the Wisconsin Rules of Appellate Procedure, the attorney is permitted a direct appeal to the Wisconsin Supreme Court.

**Due Process Applies to Attorney Disciplinary Proceedings**
**(It is a quasi-criminal proceeding)**

An attorney's license to practice law is a property interest conferred by the State of Wisconsin, and, as such, is protected by the due process provisions of both the State and Federal Constitutions. *Board of Regents v. Roth* (1972), 408 U.S. 464, 92 S.Ct. 2701.

*In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), the U.S. Supreme Court upheld a federal court

challenge to the Ohio Supreme Court order of disbarment because Ruffalo was deprived of due process in the Ohio proceeding not withstanding the Ohio order was final and no review was had before the U.S. Supreme Court. At p. 1226 the Court stated that state disciplinary proceedings are "adversary proceedings of a quasi-criminal nature" and that the sanction of disbarment (suspension etc.) "is a punishment or penalty imposed on the lawyer and he is entitled to due process." The court stated the attorney was denied due process by the Ohio practice of raising additional charges against the attorney after the complaint was filed, without adequate opportunity to respond.

In *Matter of Thorup*, D.C. App 432 A.2d 1221, 1225 the Court restated:

> Disciplinary proceedings are adversary, adjudicatory proceedings. In as much as they are concerned with property rights of respondent-bar members, due process safeguards must be observed. *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); *In re Colson*, D.C.App., 412 A.2d 1160 (1979); *In re Wild*, D.C.App., 361 A.2d 182 (1976). This means that procedural requirements analogous to those of other "contested cases" must be observed in attorney disciplinary cases.

The attorney is, therefore, entitled to the full panoply of due process protections including notice and opportunity to be heard, *Goss v. Lopez*, 419 U.S. 565, 573 (1975), and, to be heard before an unbiased decisionmaker. In *Wisconsin v. Constantineau* (1971), 400 U.S. 433, 437, 91 Sup. Ct. 507, the U.S. Supreme Court stated:

> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is

> doing to him, notice and an opportunity to be heard are essential.

In *Withrow v. Larkin*, (1975) 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, the United States Supreme Court stated:

> Concededly, a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). This applies to administrative agencies which adjudicate as well as to courts. *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973). *Not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness."* *In re Murchison*, supra, 349 U.S., at 136, 75 S.Ct., at 625; cf. *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or *criticism from the party before him.* (Emphasis added)

See also *Ward v. Village of Monroeville*, 93 S.Ct. 80, 83, 409 U.S. 61 (1972), and *Hortonvile J.S.D. No. 1 v. Hortonville Ed.*, 96 S.Ct. 2308, 2313, 426 U.S. 491 (1976).

In *Guthrie v. Wis. Employment Relations Comm.* 107 Wis.2d 306, 312, 320 N.W.2d 213 (1982), the Wisconsin Supreme Court further held that due process requires that "hearings" must not only be fair in fact, but must appear to be fair, and to be free of an aura, of partiality, impropriety, conflict of interest, or prejudgment.

***Reason #1:*** **Denial of due process in assessment of costs.**

The costs of $9168.56 were entered without notice, without a hearing, without bill of costs, or any evidence in the record contrary to the constitutional guarantees of due process. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Fuentes v. Shevin*, 92 S.Ct. 1963, 1994-95, 407 U.S. 67, 32 L.Ed.2d 556 (1972), *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 70 S.Ct. 652 , 94 L.Ed. 865. CF cases cited above including *Wisconsin v. Constantineau*, *Goss v. Lopez* and *In Re Ruffalo.*

On July 11, 1984, the referee filed his report with the clerk of the Wisconsin Supreme Court pursuant to SCR 21.09(5) in the disciplinary proceeding. Appendix B, 8a. He recommended a public reprimand and also awarded costs to the respondent BAPR which included his referee fees. SCR 22.20, and 22.01(6m) However, the BAPR did not file a bill of costs, as required under Wis. Stat. 814.10 and the matter proceded on appeal without any evidence thereof in the record before the Supreme Court. (App. F, 19a)

On July 16, 1984, Petitioner timely filed a notice of appeal of the referee's report as provided in SCR 21.09(5). SCR 21.09(6) mandates that such appeal to the supreme court from the report of the referee is to be conducted under the rules governing civil appeals to the supreme court. (The proceedings before the referee are conducted as a trial of a civil action to the court under the rules of civil procedure. SCR 22.14 & 22.23) Wis. Stat. 809.63, rules of civil procedure, provides that on appeal to the supreme court the rules governing procedures in the court of appeals apply in the Wisconsin Supreme Court. Wis. Stat. 809.25 governs *allowance* of costs and fees in the supreme court in behalf of a party and the "allowable costs". Taxation of costs is done by the clerk under 809.25(c) upon notice but only upon a

statement of costs *filed within 14 days of the decision* by the party seeking costs. The clerk (and the court) has no authority to assess costs if the prevailing party does not file a bill of costs. *Luebke v. Watertown* (1939) 230 Wis. 512, 519-22, 284 N.W. 519. In *Luebke*, the clerk without notice and without a bill of costs entered $5 clerk's fee and $50 "statutory" attorneys fee for defendant in a judgment dismissing the complaint without following the cost taxation statute which is now 814.10 Wis. Stats.

Noting that such costs were allowable, the court, nevertheless, harshly admonished that costs: p. 520.

> ". . . cannot be slapped on by counsel for the successful party, or the clerk of the court, *or by the court for that matter*, without service of a cost bill. We consider that the costs should be stricken from the judgment."
> (emphasis added)

Assuming the Wisconsin Supreme Court had authority to allow on appealthe costs defined in SCR 22.01(6m), which only the referee can determine under SCR 22.20, the Supreme Court could not do so without notice and hearing or without a bill of costs filed by the BAPR, muchless an ex parte determination by the outrageous resort to whatever was on the books of the BAPR.

It appears self-evident that Petitioner was denied his constitutional rights of due process and equal protection of the laws. The judgment of $9168.56 is void.

***Reason #2:*** **Denial of a fair and impartial hearing.**

There was a denial of due process because of a lack of a "fair hearing before an impartial decisionmaker". *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). *Withrow v. Larkin*, supra, sets forth the criteria for determining bias citing the *Tumey* and *Ward* cases,

supra. In *Ward v. Village of Monroeville*, 93 S.Ct 80, 83, 409 U.S. 61 (1972), which involved a mayor who levied fines as a traffic judge in which he and the village received part of the fines, the Supreme Court held:

> The fact that the mayor [in Tumey] there shared directly in the fees and costs did not define the limits of the principle. Although "the mere union of the executive power and the judicial power in him cannot be said to violate due process of law," id., at 534, 47 S.Ct., at 445 the test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused . . . ." Id., at 532, 47 S.Ct., at 444. Plainly that "possible temptation" may also exist *when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court.* This, too, is a "situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." Id., at 534, 47 S.Ct., at 445. (Emphasis added)

The Wisconsin Supreme Court (Chief Justice) is responsible for the BAPR finance as part of the state appropriation budget of the Wisconsin Supreme Court. SCR 22.19, *State ex rel. Moran v. Dept. of Admin.*, 103 Wis.2d, 311, 317-318, 307 N.W.2d 658 (1981). The unconstitutional structure of the SCR rules is patent and flagrant as the referee or the Wisconsin Court, (or the BAPR when it acts as an adjudicator) under the SCR disciplinary procedure might offer a "possible temptation" not to "hold the balance nice, clear,

and true between the state and the accused" attorney, particularly where the controversy involves a BAPR member or law firm, and the referee awards his own fee. *The Wisconsin decisionmaker was incompetent to decide its own bias. Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973). An analysis of the procedures utilized confirms the conflict of interest, or bias, and denial of due process, to wit:

SCR CHAPTER 21 and 22 of the rules provide as follows:

**PREAMBLE**

> The board of attorneys professional responsibility is established as an arm of the Supreme Court to assist in the discharge of the court's constitutional responsibility to supervise the practice of law and protect the public from professional misconduct by members of the bar.

SCR 21.15 Official duties

> Referees and members of the board, board staff, board counsel and members of district professional responsibility committees acting in the course of their duties under SCR chapters 21 and 22 are acting on behalf of the supreme court with respect to the statutes and supreme court rules and orders regulating the conduct of attorneys.

SCR 22.20 Assessment of costs, provides:

> The board or referee in a proceedings may assess all or part of the costs of the proceeding against the respondent. *Costs are payable to the board.* (Emphasis added)

Only the referee has jurisdiction to assess cost under SCR 22.20 in the proceeding before him. SCR 22.14 provides that the referee is required to conduct the proceedings as a trial of a civil action to the court. The referee had no authority to

delegate the assessment of the cost of the proceeding under SCR 22.20 to the Board of Attorneys Professional Responsibility or to the Supreme Court.

SCR 22.01 (6m) defines "cost" to mean " . . . the compensation and necessary expenses of referees, fees and expenses of counsel for the Board. . . * * * , and any other costs and fees permitted by chapter 814 of the statutes." The referee is working in behalf of Supreme Court (appointed by the Supreme Court under SCR 21.09 (4)) under SCR 21.15 with the power of a judge, SCR 22.03. The BAPR is an arm of the Supreme Court.

SCR 22.20, "educes" the conflict of interest in deciding a case in which the referee, the BAPR, and the Supreme Court had a pecuniary interest relating to the payment of "their" referee fees, and BAPR attorney fees to alleviate their fiscal responsibility under SCR 22.19.

## GENERAL ATTACK ON CONSTITUTIONALITY OF SCR RULES

Finally, the assessment of such cost under SCR 22.20 is unconstitutional because it inhibits a proper defense by the attorney under penalty of heavy cost (the more he defends - the higher the cost). It is also in direct conflict with SCR 22.19 which provides that such expenses "shall be" charged to the state appropriation under 20.680 of the statutes. The arbitrary and overreaching effect on one's constitutional rights is self-evident.

The referee could only award his fee against the petitioner, or the BAPR attorney fee, unless he found against the petitioner. This is constitutionally unacceptable. It made the entire proceeding perverse, particularly where the misconduct of its "arm" was directly involved. It was probably for all these reasons that the Supreme Court perversely

assessed costs ex parte. In *Guthrie v. Wis. Employment Relations Comm.*, 107 Wis.2d 306 the Wisconsin Supreme Court adopted the rule that hearings must not only be fair in fact, but *must appear to be fair, and to be free of an aura of partiality, impropriety, conflict of interest, or prejudgment.* The record exhibits more than an aura of impropriety.

The Wisconsin Court failure to review on appeal the petitioner's arguments and the misconduct of the BAPR members demonstrates further bias. For example, the petitioner's argument that his disclosure of a client's concealment of assets to the trial court in chambers did not violate the Canons of Ethics was ignored, particularly Wis. Stat. 905.03. App. F, 19a, see Petitioner's Briefs in Wisconsin appeal record.

Wis. Stat. 905.03 Lawyer-client privilege, provides in part:

> (4) Exceptions. That is no privilege under this rule:
>
> (a) "Furtherance of crime or fraud". If the service of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or
>
> * * *
>
> (c) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or
>
> * * *

Also, SCR 20.22 (and SCR 20.36(2)) does not mandate that the attorney has to do anything other than *report* the alleged fraud to the court. The attorney, in my opinion, is prohibited from arguing against his client or pursuing the matter further beyond reporting the matter to the trial judge.

This case involves multiple allegations in which the risk of a biased adjudicator is too high to be constitutionally tolerable, *Withrow*, supra:

> (1) The adjudicator has a pecuniary interest in the outcome. (Reimbursement of referee and attorney fees and saving appropriation expense under SCR 22.19.)
>
> (2) The adjudicator and its members are adjudicating a controversy involving misconduct and illegal conduct of the adjudicator and/or its members. (Libman, Krueger, Price, Lonsdorf and Mallery.)
>
> (3) The adjudicator has a personal or official stake in the outcome. (Cover up BAPR misconduct in the administration of attorney discipline.)
>
> (4) The adjudicative body has been conferred with investigative and adjudicative powers by the State which poses an unconstitutional risk of actual bias or prejudgment. (Investigation and adjudication of misconduct within its ranks.)
>
> (5) The adjudicative body has been charged with misconduct by party before it. (Charged with covering up illegal conduct involving board members, Libman, Harlan and administrator Price and Krueger committee and its member attorney's law firm.)

As in Sir Arthur Conan Doyle's mystery, *Silver Blaze*, there is a glaring "silence" in the decision of the involved misconduct of the "arm" of the Wisconsin Supreme Court.

***Reason #3:*** **A void 1979 private reprimand.**

The Petitioner moved to strike the 1979 private reprimand raised on cross appeal by the BAPR in its brief without opportunity afforded Petitioner to defend against it. *In Re Ruffalo*, supra. Petitioner also moved to have it declared

null and void because it was entered without a valid hearing, without right of appeal, and without his consent contrary to law, SCR 21.09(2). The BAPR, after five years, did not raise the private reprimand before the referee, but on cross appeal, contrary to the rules of appellate procedure. CF, *Goss v. Lopez*. Plainly apparent is the fact that the petitioner was denied due process as he did not have an opportunity to answer the 1979 reprimand charge as it was not raised in the BAPR complaint or to show the deed which merely corrected a numerical description error was recorded per a court order. (App. E, 17a)

Libman claimed no interest in the property described in the deed, did not appear at the trial, but sought to impose a restriction against recording the deed if a settlement was paid to another party in the quiet title action thus impeding the settlement policy of the State of Wisconsin regarding dispositions of the lawsuits, and pursuing meritless restrictions contrary to SCR 20.36.

## CONCLUSION

Petitioner was denied his constitutional rights of due process in the assessment of ex parte costs without a hearing and without a bill of costs, in having the 1979 private reprimand raised in the 1984 proceeding wherein it was rendered without a hearing and without his consent. Additionally the SCR Rules as applied present constitutionally unacceptable procedures where the referee and the Supreme Court adjudicate their own fees and the reimbursement of fiscal expenses, particularly wherein the more the attorney defends himself the more he subjects himself to the payment of expense, a factor which inhibits a fair defense. Finally there is the patent unconstitutional situation of not having a fair hearing before an impartial adjudicator wherein the controversy, such as the case here, involves a charge of misconduct of the BAPR members in the controversy before the court. Nothing has been so flagrantly abused in the present case as shown by the Wisconsin Supreme Court biased reference in its decision that attorney Lonsdorf claimed the petitioner was asking $5000 not to file the affidavits when in fact they had already been filed in chambers with the trial court, but neglecting to refer to my affidavit on fees, (exhibit #3 of the record on appeal before the Wisconsin Supreme Court), App. F, which Lonsdorf had in his possession three days before the hearing and which reveals that petitioner's affidavit advised the court that $3000 was the amount being requested on the alleged fee controversy. Furthermore the record on the substitution of hearing, to which attorney Lonsdorf or Mr. Springer made no objection, clearly shows what transpired. (Exhibit #6 of the record before the Wisconsin Supreme Court), App. F. My unrebutted comments to the trial court stand on their own merit as to what happened:

> THE COURT: I have not had an opportunity to read your affidavits.

I have been on the bench constantly with the exception of a short lunch break since they arrived this morning.

MR. RADER: I wanted to make those of record. These are reasons I advised him not to appeal.

So now I have received no response with respect to improper charges, not giving proper credits, and I have spent considerable amount of time turning my file over to them.

Now, the point I am making about this is that they have gone to someone else.

I want a clean slate.

* * *

And I feel that if they have any objection to my fees, as to improper credits or *something else* that I should be made aware of that. (Emphasis added)

For all of the above reasons the writ should be granted.

Respectfully submitted,

LARRY W. RADER, ESQUIRE
*Pro Se*
P.O. Box 684
Wausau, Wisconsin 54401
(715) 842-3252

# APPENDIX

# APPENDIX A

## STATE OF WISCONSIN: IN SUPREME COURT

In the Matter of Disciplinary Proceedings
Against LARRY W. RADER, Attorney at Law

**No. 83-2101-D**

**PER CURIAM**

**Attorney disciplinary proceeding; attorney's license suspended.**

Attorney Larry W. Rader appeals from the referee's report concluding that he revealed client confidences and used those confidences to his advantage and to the disadvantage of his client and recommending that he be publicly reprimanded for unprofessional conduct. The Board of Attorneys Professional Responsibility cross-appeals from the referee's recommendation for discipline, taking the position that the recommended public reprimand is too lenient and that a suspension of Attorney Rader's license for at least 90 days is appropriate discipline. We accept the referee's findings of fact and conclusions that Attorney Rader violated SCR 20.22(1)(b) and (c) by knowingly using client confidences without the clients' consent to the disadvantage of the clients and for his own advantage. However, we do not accept the referee's recommendation of a public reprimand; we conclude that Attorney Rader's unprofessional conduct warrants the imposition of a 90-day suspension of his license to practice law.

Attorney Rader was admitted to practice in Wisconsin in 1960 and practices in Wausau. He was previously disciplined

in 1979, receiving from the Board a private reprimand for having recorded a deed that had been given to him by another attorney with explicit instructions not to record it unless notified otherwise. In the context of this appeal, Attorney Rader filed a motion to have the 1979 private reprimand struck from the court's records, filed a motion to supplement the appendix of his appellate brief in support of the motion to strike, and filed a motion requesting the court to take judicial notice of alleged misconduct by the Board in its investigation of the 1979 matter. We deny each of those motions.

This disciplinary proceeding concerns Attorney Rader's representation of one of three brothers who were partners in the operation of a farm and whom Attorney Rader represented in partnership matters. In 1980 one of those brothers, LaVerne Springer, retained Attorney Rader to represent him in a divorce action. The divorce was bitterly contested, and Mr. Springer was dissatisfied with the court's award of property division. Attorney Rader brought several unsuccessful motions for reconsideration of that award.

When Attorney Rader refused Mr. Springer's request to appeal the court's judgment, Mr. Springer obtained other counsel to represent him in taking an appeal, but Attorney Rader refused to sign a substitution of attorney form. Attorney Rader claimed his refusal to appeal the judgment was the result of having discovered his client had hidden assets in the divorce proceeding which would have to be disclosed to the court if the matter were pursued. Attorney Rader maintained that he refused to consent to the substitution of attorney in order to bring the matter of the alleged hidden assets to the court's attention. However, the referee, the Hon. Rodney Lee Young, reserve judge, found that Attorney Rader wanted the substitution issue to go

before the court so that a disagreement between him and Mr. Springer over his fees in the divorce action would be resolved.

In preparation for the hearing on the substitution motion, Attorney Rader prepared three affidavits attempting to establish the fact that Mr. Springer had hidden assets from the court in the divorce action, and he informed the proposed successor attorney, James Lonsdorf, that he intended to file those affidavits with the court prior to the hearing on the substitution motion. The affidavits disclosed information concerning not only LaVerne Springer, but also the Springer brothers and their farm partnership dealings, as well as problems LaVerne Springer had been having with his wife and with the partnership. Attorney Lonsdorf asked Attorney Rader not to file the affidavits because of their prejudicial content, but the affidavits were delivered to the judge's chambers on the morning of the hearing. Unaware that the affidavits had been delivered, Attorney Lonsdorf spoke to the judge in chambers and asked that he not read the affidavits should they be filed. The affidavits were sealed in the court's file, and the judge did not read them.

At the disciplinary hearing, Attorney Lonsdorf testified that he had obtained access to Attorney Rader's files in the divorce action with the express understanding between himself and Attorney Rader that he would review Attorney Rader's fees with Mr. Springer and help resolve the fee dispute. Attorney Lonsdorf also testified that when Attorney Rader gave him copies of the three affidavits two days prior to the hearing on substitution, Attorney Rader told him he might file the affidavits but that Attorney Lonsdorf should discuss the fee issue with Mr. Springer. Attorney Lonsdorf further testified that on the afternoon of the hearing on the substitution motion he asked Attorney Rader not to file the affidavits, not realizing that they had

already been delivered to the judge in chambers, and that Attorney Rader told him that if he were not paid $5,000 in fees for his representation of Mr. Springer in the divorce action, he was going to file them. Attorney Rader subsequently reduced his demand to $1,500, but Mr. Springer refused to pay him anything.

The referee found that by preparing those affidavits and delivering them to the court, Attorney Rader sought to use the hearing on the substitution motion as a means of obtaining payment of his fees in the divorce matter, as well as to inform the court of his suspicion that his client had withheld certain assets from the court during the divorce proceeding. The referee also found that the affidavits disclosed information about his client's marital problems which Attorney Rader had obtained through office conferences with LaVerne Springer, as well as partnership information obtained through office conferences with the three brothers, and that all of the clients had expressly requested that such information be kept confidential.

The referee concluded that Attorney Rader's primary interest and objective in requiring a court hearing on the substitution motion was to obtain payment or settlement of his fees and that the threat of filing the affidavits was contingent upon a settlement of those fees. This conduct constituted a knowing use of a client confidence without the client's consent to the disadvantage of the client and for Attorney Rader's own advantage, in violation of SCR 20.22(1)(b) and (c). The referee found that Attorney Rader's attempt to inform the court of what he termed "suspicious circumstances" indicating his client's allegedly having withheld assets in the divorce proceeding was "indirectly and inferentially made, but not pursued."

We find to be without merit Attorney Rader's argument that no privileged or confidential client information was

publicly disclosed by his having delivered the affidavits to the judge in chambers. In Attorney Rader's cover letter accompanying the affidavits and in his testimony at the substitution hearing, he made clear his intention that the affidavits be filed and made a part of the record in the divorce action. We likewise reject his contention that his client's alleged nondisclosure of assets in the divorce proceeding justified his disclosure of the information contained in the affidavits. Attorney Rader's mere suspicion of hidden assets is insufficient to establish the existence of a fraud on the part of his client, especially in light of the fact that there has been no showing, in this proceeding or in any other, that the client, in fact, had failed to disclose the existence of assets in the divorce proceeding. Even if the hiding of assets had been proved, Attorney Rader would not have been justified in disclosing the information set forth in two of the affidavits which did not concern the hidden asset issue but were directed to the question of justifying the fees he charged his client for representing him in the divorce action.

In his brief Attorney Rader argued that he was ethically obligated to disclose to the court his suspicion that his client had failed to disclose assets which were subject to the court's jurisdiction. He claimed to have learned of the alleged hidden assets in June of 1981, when he reviewed a farm partnership income tax return for the preceding year. That return listed a depreciation deduction of $29,000, one-third of which would have belonged to his client. In addition, the court apparently had erred in its calculation of Mr. Springer's property, deducting therefrom his share of the partnership's $60,000 debt for the purchase of machinery and equipment without correspondingly increasing the value of Mr. Springer's property by $20,000, his share of the value of the machinery and equipment purchased.

In response, the Board argued that Attorney Rader did not appreciate his ethical obligation to reveal suspicious

circumstances to the court until after his client discharged him in June of 1981. The Board noted Attorney Rader's testimony that in his opinion the alleged hidden assets would not have had to be disclosed to the court if no further action had been taken in the divorce proceeding. Also, Attorney Rader testified that he had noted the depreciation deduction on the partnership tax return in April or May of 1980, although the depreciation schedule supporting that deduction was not made available until June.

The referee's findings of fact are not clearly erroneous, and we therefore accept them. *Disciplinary Proceedings Against Swartwout*, 116 Wis. 2d 380, 342 N.W. 2d 406 (1984). We also accept the referee's conclusions of law that Attorney Rader's conduct violated SCR 20.22(1)(b) and (c).

We agree with the Board that such misconduct warrants discipline more severe than the public reprimand recommended by the referee. Attorney Rader's affidavit disclosed not only his divorce client's confidences, but also those of another client, the farm partnership. Attorney Rader's motive for disclosing those confidences exacerbates his misconduct; he betrayed his clients' trust out of self-interest, thereby placing himself above the professional obligations attendant upon the attorney-client relationship. It is ironic that he claims to have been motivated by a professional obligation to prevent what he maintains was a fraud on the court. On the contrary, his attempts to justify his actions evince a total disregard for his professional obligations.

The Board filed a motion to strike portions of Attorney Rader's brief that were either not of record or for which no accurate references to the record were made. Notwithstanding the correctness of the Board's position, we deny that motion, having considered in this appeal only that evidence which had been admitted in the disciplinary proceeding.

It is ordered that the license of Attorney Larry W. Rader to practice law in Wisconsin is suspended for 90 days, commencing February 1, 1985.

It is further ordered that within 60 days of the date of this order Attorney Larry W. Rader pay to the Board of Attorneys Professional Responsibility the costs of this disciplinary proceeding in the amount of $9,168.56, provided that if the costs are not paid within the time specified and absent a showing by Attorney Rader of his inability to pay those costs within that time, the license of Attorney Larry W. Rader to practice law in Wisconsin shall be suspended until further order of the court.

It is further ordered that Attorney Larry W. Rader comply with SCR 22.26 concerning the requirements of a person whose license to practice law in Wisconsin has been suspended or revoked.

It is further ordered that the three motions filed by Attorney Rader and the motion filed by the Board in this disciplinary proceeding are denied without costs.

## APPENDIX B

IN THE SUPREME COURT
STATE OF WISCONSIN

---

In the Matter of the Disciplinary Proceedings Against:
Larry W. Rader
Attorney at Law
Wausau, WI

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REPORT AND RECOMMENDATIONS
FOR DISCIPLINE

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**Case No. 83-2101-D**

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**REPORT OF REFEREE**

On November 3, 1983 the Board of Attorneys Professional Responsibility filed with the Supreme Court a complaint alleging two counts of professional misconduct against the Respondent Larry W. Rader alleging misconduct by knowingly reveal and use confidential and secret information of Lavern Springer as defined in SCR 20.01 (2) and (8) for Respondents advantage and to the disadvantage of Springer, in violation of SCR 20.22 (1)(b) and (c). The hearing on the disciplinary matter was held at the courthouse in the city of Wausau, Marathon County, Wis., on May 17, 1984. The Board of Attorneys Professional Responsibility by Dexter C.R. McKelvey attorney, the Respondent appeared in person without counsel.

Based upon the testimony of the complainant, other witnesses and the Sixteen (16) marked exhibits received in this case I do make the following:

## FINDINGS OF FACT

1. That the Board of Attorneys Professional Responsibility "Board" is a body organized and existing pursuant to Chapter 21 Wisconsin Supreme Court Rules of 1982 and is now acting as such.

2. That Larry W. Rader, Respondent, is an attorney at law duly licensed to practice law in the Supreme Court and all courts of the State of Wisconsin, and has practiced since 1961 and maintains his practice in Wausau, Marathon County, Wisconsin.

### COUNT I

3. That prior to April 1, 1980, Respondent had been retained by and was representing Lavern J. Springer, in the case entitled, in re the marriage of Judy Ann Springer and that Judy Ann Springer was represented by attorney Roy T. Traynor.

4. That for a period of time and in the course of the divorce proceedings Respondent represented the Springer Brothers in partnership matters.

5. That the court's written decision in the divorce matter was entered March 31, 1981, followed by a Motion to Reconsider on April 6, 1981 and the Court's decision thereon on April 16, 1981. (Exhibit #23).

6. That Respondent's suspicion that the Springers had not fully disclosed all partnership assets to the court was confirmed, in Respondent's opinion, when he discovered in June of 1981 that the 1980 Income tax return, filed with the court, did not include a depreciation schedule that disclosed the purchase of $60,000.00 worth of machinery in that year.

7. That Respondent's client was unhappy with the terms of the divorce judgment and pressed Respondent to appeal the case or move the court to amend the judgment.

8. That Respondent counseled against the appeal and refused to bring another motion to amend the divorce judgment unless Lavern Springer agreed to make full disclosure of partnership assets not previously reported to the Court.

9. That an argument took place in Respondent's office between Respondent and his client when the client claimed he was charged in his account for work performed for other parties and he flatly refused to make any further payment to Respondent and fired Respondent as his attorney.

10. That Respondent's position is that he fully cooperated with the proposed substitute attorney, James P. Lonsdorf, and made all of Springers files available to him, that in return Respondent expected and believed that Lonsdorf would review with Springer any objections he had to Respondent's charges and credits and report back to Respondent so that proper adjustments, if any were indicated, could be made.

11. That Respondent refused to deliver a signed consent to Substitution of Attorney, to Lonsdorf because little or no attention had been given to Respondent's unpaid account for services and disbursements charged to Springer. Respondent wanted the matter of substitution to go before the Court, with the thought that his fees would be considered or paid and Respondent also sought to somehow inform the court of what he termed a constructive fraud.

12. That Respondent prepared three affidavits, (Exhibits 1, 2, 3) and a transmittal letter (Exhibit 4) in preparation for this scheduled hearing on the matter for substitution of attorneys. Two days before the hearing Respondent furnished James P. Lonsdorf with copies of the three affidavits for the purpose as Respondent testified, "so he could have an opportunity if he wanted to bring a motion for protective order he could do so" (Transcript p. 196).

13. That the affidavits by Respondent delivered to the Court on the morning of August 7, 1981, prior to the scheduled hearing were not read by Judge Stevens, but at the request of Lonsdorf Exhibits 1, 2, 3 and 4 were sealed in an envelope and retained in the Court's file, although Respondent specifically requested that the affidavits be made a part of the record (Transcript p. 198).

14. That Respondent, by the preparation and delivering to the Court affidavits (Exhibits 1, 2, & 3) sought to use the hearing on the substitution of attorney, as a means of obtaining satisfaction of his attorneys fees and apprising the Court of Respondent's suspicion that his client had withheld from the court knowledge of certain undisclosed assets.

15. That said affidavits disclosed information about marital problems obtained through office conferences with his client Lavern Springer and partnership matters obtained through office conferences with his clients William and Robert Springer, all partners of Springers Brothers Farms; that his clients had expressly requested that all such information be kept confidential; that in Exhibit 1, paragraph 3 Respondent in an indirect manner revealed to the Court "suspicious circumstance" of hidden partnership assets, that have not since been a subject of Court hearing or proven by credible evidence.

## CONCLUSIONS OF LAW

16. That the contents of Respondents affidavits (Exhibits 1, 2 and 3) reveal and disclose confidential and secret information concerning clients interest that Respondent obtained through conferences in an attorney-client relationship. That by filing the affidavits with the Court, in the hearing for substitution of attorney, Respondent violated his professional responsibility to his clients.

17. That Respondents primary interest and objective in requiring a Court hearing on the petition for substitution of attorneys in the Springer divorce matter was to obtain payment or settlement of his fees; that the threat of filing the three affidavits was contingent upon a settlement of the fee issue; the attempt to inform the Court of suspicious circumstances that indicated the withholding of assets was indirectly and inferentially made, but not pursued,

18. That the disclosure or the threat of disclosure of the confidences and secrets of his client to induce a settlement of a fee account is misconduct in the nature of knowingly using a confidence or secret of his client without the clients consent to the disadvantage of the client and for his advantage in violation of SCR 20.22 (1)(b) and (c).

**RECOMMENDATION FOR DISCIPLINE**

Based upon the above Findings of Fact and Conclusions of Law, I Rodney Lee Young, Referee make the following recommendations for discipline.

1. That the Respondent Larry W. Rader be publicly reprimanded

2. That the Respondent Larry W. Rader pay to the Board of Attorneys Professional Responsibility the costs and fees incurred in this disciplinary action as determined by the Board and pursuant to SCR 22.20, within 30 days following the date of the order.

Respectfully submitted this 9th day of July, 1984.

Rodney Lee Young
Referee

## APPENDIX C

Exhibit #4

LAW OFFICES
LARRY W. RADER
605 FIRST AMERICAN CENTER
WAUSAU, WISCONSIN 54401

715/845-4278

August 7, 1981

Honorable John W. Stevens
Circuit Court Judge
Marathon County Courthouse
Wausau, WI 54401

Re: Springer Divorce

Dear Judge Stevens:

Enclosed are three affidavits for filing, which were served last Wednesday on Attorney Lonsdorf, relating to the LaVerne Springer Motion for Substitution of Attorney.

Since April of 1981, I have refused to become involved in any appeal of the Divorce settlement decision. As you know, the 1980 partnership returns were not completed at the time of trial and were subsequently filed at the request of the Court. Because of the "suspicious" application of the $29,000 depreciation deduction I refused to have any part of processing an appeal or any part in a third party law suit which they wish to commence against the father-in-law, Mr. Wilde.

Not only have they made disruptive threats in my office, but I understand from Attorney Traynor, that he was physically accosted by Mr. LaVerne Springer and threatened in

the Courthouse after the Divorce hearing—a situation that I was not aware of until just recently.

Because of the above circumstances, notwithstanding that Mr. Lonsdorf has requested that I not file the affidavits so that he can proceed with the appeal, it is my opinion and decision at this time that the Court has to be apprised of the situation.

Very truly yours,

Larry W. Rader

LWR:cb

Encl.

cc: James P. Lonsdorf

## APPENDIX D

In re the marriage of:

JUDY ANN SPRINGER,

*Petitioner,*
*(Appellee)*

-AND-

LAVERNE J. SPRINGER,

*Respondent.*
*(Appellant)*

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**Case No. 80-CV-404**

---

AFFIDAVIT
OF
LARRY W. RADER

---

Larry W. Rader, being first duly sworn on oath, deposes and states as follows:

1. That affiant, in April, 1981, reviewed the Springer Brothers 1980 partnership return, filed with the court after the close of evidence, as William Springer wanted a separate receipt because of the partnership fee deductions and the split between the partnership and LaVerne on their tax returns.

2. That as part of not recommending an appeal, affiant raised the question to the Springers concerning the application of the $29,000 depreciation deduction as shown on the partnership return. They said they paid bills. Affiant said it sounded like another "heiffer" explanation and would not pursue the appeal.

3. That since the Springers have gone to Attorney Lonsdorf's office and in view of the questions raised, affiant has reviewed the depreciation schedule and deduction with an accountant in August, 1981. Said accountant has advised said affiant that the deduction creates a very "suspicious circumstance" and in all probability the partnership has "hid" approximately $29,000 from its 1980 assets; the accountant did, however, qualify it, saying that the only way a determination could be made would be if a balance sheet was prepared and a determination made as to the application of said amount to any partnership indebtedness.

4. In addition, said accountant has confirmed the advice that affiant has given LaVerne Springer, that the Court probably errored in its Decision in deducting his $20,000 obligation for the newly acquired $60,000 worth of machinery in 1981, as the Court failed to increase LaVerne's partnership interest by $20,000.

_____

Larry W. Rader

Subscribed and sworn to before me this 4th day of August, 1981.

_____

Notary Public, State of Wisconsin
My commission is: _____

## APPENDIX E

BRANCH I
CIRCUIT COURT

STATE OF WISCONSIN
MARATHON COUNTY

---

DUANE L. KARAU AND
BARBARA A. KARAU,
HIS WIFE,

*Plaintiffs*,

VS

DONNA J. STROICK, *et al*,

*Defendants*.

---

**ORDER FOR DISMISSAL**

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**CASE NO. 26521**

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The above entitled quiet title action having come on for trial and the plaintiffs, Duane L. Karau and Barbara A. Karau, his wife, appearing in person and by their Attorney, Larry W. Rader, and the defendant, Donna J. Stroick, appearing in person and her Attorney, Jon Peterson, and Peoples State Bank appearing by their Attorney, C.J. Crooks, and Konrad T. Tuchscherer, S.C. having filed an appearance for Barry Libman and Carmen Libman, his wife, and each of the defendants having executed a Quit Claim Deed or release of their interest in the property described in Certified Survey Map #1466,

NOW, THEREFORE, on motion of the plaintiffs and the record herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above entitled action be and hereby is dismissed on its merits without prejudice and without costs to any party.

Dated at Wausau, Wisconsin this 13th day of October, 1978.

Ronald D. Keberle, Circuit Judge

# APPENDIX F

| TITLE OF CAUSE | ATTORNEYS OF RECORD |
|---|---|
| 83-2101-D | Dexter C.R. McKelvey<br>1016 Arlington Place<br>Stevens Point, WI 54481<br><br>Board of Attorneys Professional Responsibility |
| In the Matter of Disciplinary Proceedings Against<br><br>LARRY W. RADER,<br>Attorney at Law. | Larry W. Rader<br>605 First American Center<br>Wausau, WI 54401<br><br>Honorable Rodney L. Young<br>701 West 5th Street, North<br>Ladysmith, WI 54848<br>(State Bar) |

| | |
|---|---|
| 11/3/83 | Complaint, Order to Answer and Proof of Service filed. |
| 11/3/83 | Proposed Answer filed. |
| 11/16/83 | ORDERED Hon. Rodney L. Young appointed referee. Copy of all papers sent to referee. |
| 11/21/83 | Answer filed. Copy to referee. |
| 12/2/83 | Scheduling Order filed. ORDERED scheduling conference be held 12/8/83, 10 am, Marathon County Courthouse, Wausau. |
| 12/6/83 | Scheduling conference rescheduled for 12/12/83, 11 AM. |
| 12/19/83 | ORDERED hearing be held 1/26/84, 11 am, Marathon Co. Cthse., Wausau. |
| 2/2/84 | Report of adjourned scheduling conference filed. ORDERED hearing be held 4/23/84, at 10:00 am, Marathon County Courthouse, Wausau. |

2/23/84 IT IS ORDERED that the hearing date of 4/23/84 is hereby cancelled and that a hearing date in the above matter be held on 5/17/84, 10:00 a.m., Marathon County Courthouse, Wausau, Wisconsin.

7/11/84 Filed two (2) packages of exhibits, transcripts of proceedings held 5/17/84 and 5/18/84. Forwarded court reporter's invoices to fiscal and BAPR.

7/11/84 Referee's report filed. Letter to parties advising of time for filing an appeal.

7/16/84 Recd. expense list from referee. Forwarded to fiscal and BAPR.

7/16/84 Notice of appeal filed by Rader. Letter to parties re filing of appeal and advising on briefing schedule.

7/16/84 Billed, Inv. no. 1665.

7/30/84 Notice of cross-appeal filed by counsel for the BAPR. Letter to parties.

8/20/84 Appellant's brief filed.

9/14/84 Respondent and Cross-Appellant's briefs filed.

9/25/85 Appellant's reply brief filed.

10/10/84 Cross-Respondent's brief filed.

10/11/84 Cross-Appellant's reply brief filed.

10/22/84 ASSIGNED ON BRIEFS

11/27/84 TO BE SUBMITTED.

12/21/84 Per Curiam. ORDERED that the license of Rader to practice law is suspended for 90 days commencing 2/1/85. FURTHER ORDERED that within 60 days Rader pay to the BAPR costs in the amount of $9,168.56, provided that if the costs are not paid and absent a showing by Rader of his inability to pay the costs, the license of Rader shall be suspended until further order of the court. FURTHER ORDERED that Rader comply with SCR 22.26 concerning the require-

ments of a person whose license to practice law has been suspended. FURTHER ORDERED that the three motions filed by Atty. Rader are denied without costs.

12/21/84 File closed.

Office-Supreme Court, U.S.
FILED
JUN 20 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1828

IN THE
SUPREME COURT OF THE UNITED STATES

FALL TERM, 1984

LARRY W. RADER,

Petitioner,

v.

WISCONSIN BOARD OF ATTORNEYS
PROFESSIONAL RESPONSIBILITY,

Respondents.

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND SUPPLEMENTAL APPENDIX

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BEST AVAILABLE COPY

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No. 84-1828

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

FALL TERM, 1984

---

LARRY W. RADER,

Petitioner,

v.

WISCONSIN BOARD OF ATTORNEYS
PROFESSIONAL RESPONSIBILITY,

Respondents.

---

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND SUPPLEMENTAL APPENDIX

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## STATEMENT OF THE CASE

Petitioner who was admitted to practice law in the State of Wisconsin in 1960 petitions for a Writ of Certiorari for review of the decision of the Wisconsin Supreme Court imposing discipline under Wisconsin Supreme Court

Rule (SCR) 20.22(1)(b) and (c) which provide as follows:

> SCR 20.22 — Preservation of confidences and secrets of a client. (1) Except when permitted under sub. (2), a lawyer may not knowingly:
>
> > (b) Use a confidence or secret of his or her client to the disadvantage of the client.
> >
> > (c) Use a confidence or secret of his or her client for his or her advantage or advantage of a 3rd person, unless the client consents after full disclosure.

The Wisconsin Supreme Court's decision is reported as Disciplinary Proceedings Against Rader, 121 Wis. 2d 410, 359 N.W.2d 156 (1984), (Pet. Ap. 1a-7a) and was the culmination of disciplinary proceedings originally commenced by the Board of Attorneys Professional Responsibility on November 3, 1983 alleging two counts of professional misconduct against

petitioner for allegedly revealing and using confidential and secret information for petitioner's advantage and to the disadvantage of his clients (Pet. Ap. 8a). Following a formal hearing held in accordance with the procedures specified in SCR 21.09, the referee made findings of fact (Pet. Ap. 9a-11a), conclusions of law (Pet. Ap. 11a-12a) and a recommendation for discipline (Pet. Ap. 12a). The referee also recommended that petitioner herein be ordered to pay "the costs and fees incurred in this disciplinary action." (Pet. Ap. 12a).

The referee's report was filed with the court on July 11, 1984 and an expense list was filed with the Board on July 16, 1984 (Pet. Ap. 20a).

Petitioner then appealed to the Wisconsin Supreme Court. A list of costs was filed by the Board with the court on

December 11, 1984 (Supp. Ap. 3). Briefs were filed and motions were filed by petitioner (Supp. Ap. 1, 2). On December 21, 1984 the Wisconsin Supreme Court denied the motions and ordered the license of petitioner suspended for ninety days commencing February 1, 1985 and that petitioner pay to the Board costs in the amount of $9,168.56 (Pet. Ap. 20a). Petitioner made no attempt to seek rehearing or review of the assessment of costs or of the amount of costs assessed by the supreme court. Instead petitioner filed the petition for writ of certiorari herein.

## REASONS FOR DENYING THE WRIT

### I. There Is No Denial Of Due Process In The Assessment Of Costs.

Petitioner contends that even though the referee can assess costs under

SCR 22.20 when an appeal is made to the Supreme Court of Wisconsin that court is bound by sec. 809.25 of the Wisconsin Statutes and that taxation of costs is done by the clerk on notice and statement of the costs. Apparently petitioner contends that a disciplinary proceeding involving an attorney licensed by the Supreme Court of Wisconsin is the same as a "civil appeal" originating in a Wisconsin trial court. Petitioner ignores the significant difference of a "civil appeal" from a trial court to the court of appeals and then to the Supreme Court of Wisconsin, which is governed by legislative enactments adopted by the legislature and governor of the State of Wisconsin, and the procedures specified by the supreme court for lawyer discipline. The latter are entirely separate as enactments of the judicial

branch of government as authorized under the Wisconsin Constitution. The supreme court may, if it choses, adopt procedures specified by the legislature but it is not obligated to do so. In this case petitioner's confusion arises from the adoption by the supreme court of SCR 22.14 which provides as follows:

> SCR 22.14 Hearing. The proceedings are to be conducted as a trial of a civil action to the court.

Thus, the Supreme Court of Wisconsin has directed that the hearing in a disciplinary matter shall be conducted as a civil trial. SCR 22.23(2) provides:

> SCR 22.23 Additional rules and procedure.
>
> (2) The rules of civil procedure apply in disciplinary proceedings except as otherwise provided in the rules.

Again, the hearing is to be conducted in accordance with the rules of

civil procedure "unless otherwise provided in the rules." Even if it could be argued that the assessment of costs falls within rules of civil procedure (which is not conceded) the court has specifically provided otherwise in SCR 22.20 which provides in part, "the board or referee in a proceeding may assess all or part of the costs of the proceeding against the respondent." As evidence of petitioner's misunderstanding as to the application of Wisconsin Statutes to the procedures adopted by the supreme court, petitioner cites Luebke v. Watertown, 230 Wis. 512, 519-22, 284 N.W. 519 (1939). There, it was held, that the clerk had no authority to assess costs without the service of a cost bill in accordance with the statute as enacted by the legislature. Luebke is not applicable to

a lawyer discipline case where supreme court rules are applied.

Since In re Cannon, 206 Wis. 374, 240 N.W. 441 (1932), it has been clear in the State of Wisconsin that the legislature may not interfere with the supreme court's authority in the area of lawyer admission and discipline including the assessment costs of a disciplinary proceeding. Cannon had been suspended from the practice of law for two years on July 5, 1929. State v. Cannon, 199 Wis. 401, 226 N.W. 385 (1929). In addition to the suspension, the court ordered Cannon to pay the costs of the proceeding in the amount of $2,699.78.

Thereafter, the legislature passed a law restoring Cannon's license to practice law and remitting the costs imposed by the court. The supreme court held the legislation invalid, not only in

its attempt to restore Cannon's license to practice law, but also in its attempt to remit the costs. The court said at 206 Wis. 411-12, 240 N.W. 441:

> While the act of the legislature purported to remit those costs, this attempt was also plainly beyond the jurisdiction of the legislature as an unwarranted interference with the judgment of this court.

The Cannon court also pointed out that the discipline function is judicial in nature and cannot be interfered with by the legislature. This court has reiterated that discipline or refusal by a state supreme court to license an attorney is a judicial act. In Re Summers, 325 U.S. 561 (1945), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

Therefore, there is no denial of due process but if petitioner was entitled to a review of the reasonableness of the

costs assessed, he has failed to demonstrate that he has availed himself of the review procedures available. He has also failed to specify in his statement of the case the stage in the state proceedings where the alleged federal questions were raised, the manner of raising and how decided by the Wisconsin court as required by Rule 21.1(h).

## II. Petitioner Had A Fair Hearing Before An Impartial Decisionmaker And Court Review.

Petitioner's second position appears to be that the referee, the Wisconsin Supreme Court and the Board, when it acts as an adjudicator, cannot constitutionally impose costs of the proceeding upon the attorney being disciplined. The reasoning apparently is that the Wisconsin Supreme Court and the

Board can reduce their part of the state appropriation budget for the court by imposing fees and costs and the referee in effect determines his own fee if he finds the lawyer has been guilty of unprofessional conduct. However, there is no showing that either the supreme court budget or the referee's compensation are dependent upon costs and fees being assessed. In Cannon, the court explained the reasoning behind imposing judgments for costs at 206 Wis. 412 240 N.W. 441:

> This judgment for costs was imposed on Mr. Cannon as a part of disciplinary punishment.... The legislature can no more interfere with that punishment than it can interfere with any other judicial act, which, we have seen, is entirely beyond the scope of legislative power.

The costs in any disciplinary case are paid into the state treasury and neither the salary of the supreme court

or the fees paid to the referee are dependent upon the costs so imposed.

Petitioner contends that this case resembles Ward v. Village of Monroeville, 409 U.S. 57 (1972) where this court found the lack of due process where a mayor levied fines as a traffic judge in which he and the village each received part of the fines. It is apparent that the parallel is nonexistent. In Ward, the temptation was obvious for the mayor, sitting in a judicial capacity, to short-change defendants charged with crimes who were appearing before him. Here there is no such showing.

If petitioner's theory were carried to its logical conclusion, any assessment of costs by a court would violate due process because such assessment would reduce the budgetary requirements for the

operation of the courts and the salaries of the personnel including the judge.

Again, there is no showing in the petition that there has been compliance with Rule 21.1(h) by the recitation of the stage of the Wisconsin proceedings at which the federal question sought to be reviewed was raised and the method and manner of raising, and the way it was passed upon so as to give this court jurisdiction to review.

**III. 1979 Private Reprimand Was Properly Considered By Court**

Petitioner's third contention is that a 1979 private reprimand was improperly considered by the Wisconsin Supreme Court when it determined that a ninety day suspension of petitioner's license to practice law was more appropriate than the referee's recommended public reprimand.

Petitioner does not deny that he was privately reprimanded in 1979 but contends that the reprimand was considered by the court without a valid hearing and without his consent (Pet. 18). It is not clear what reasoning petitioner is using in claiming that he did not have a valid hearing on the issue of his 1979 private reprimand. The record indicates that he filed a motion with the supreme court "to have the 1979 private reprimand struck from the court's record." (Pet. Ap. 2a). In connection with the motion, petitioner also filed with the Wisconsin Supreme Court a motion to supplement the appendix in support of his motion and a motion requesting the supreme court to take judicial notice of alleged misconduct by the Board in its investigation of the 1979 matter. (Supp. Ap. 1, 2) Those motions were considered

by the Wisconsin Supreme Court and denied. (Pet. Ap. 2a). Petitioner had notice and an opportunity to be heard on his motion. There is no violation of due process and petitioner cites no authority for such claim. Even if the Wisconsin Supreme Court erred in denying the motions concerning the 1979 private reprimand, no federal constitutional due process issue is stated. Petitioner cannot retry the 1979 reprimand in this court. If he had any objections he should have voiced them in 1979.

In a disciplinary proceeding, the Wisconsin Supreme Court is free to examine petitioner's prior disciplinary record and take prior determinations into effect in assessing the proper penalty.

State v. Hildebrand, 48 Wis. 2d 73 179 N.W.2d 892 (1970), Disciplinary Proceedings Against Eisenberg, 117 Wis. 2d 332, 344 N.W.2d 169 (1984).

Accordingly, the consideration of the 1979 reprimand by the court in assessing the ninety day suspension is of no constitutional significance and is not an adequate basis for the grant of a writ of certiorari within the meaning of Rule 17.

**IV. Whether Petitioner Sought $5,000 Or $3,000 In The Fee Controversy Is Not Of Constitutional Significance**

Although the petition is not clear in this respect, it appears in the section of the petition entitled "Conclusion," that petitioner is contending there is a constitutional violation in the Wisconsin Supreme Court's finding that petitioner would

file his affidavits in the divorce action unless he was paid $5,000 in fees for representation of Mr. Springer. The court accepted the testimony of Attorney Lonsdorf that petitioner demanded $5,000 and subsequently reduced his demand to $1,500 (Pet. Ap. 3a-4a). Petitioner apparently contends that the Wisconsin Supreme Court ignored his affidavit that $3,000 was the amount being requested on the alleged fee controversy (Pet. Ap. 19).

Petitioner fails to cite any authority for this court to second guess the Wisconsin Supreme Court on a finding of fact made from the records made in a disciplinary proceeding.

Again, petitioner has not set out in his Statement of the Case the stage of the state proceedings in which this alleged federal question sought to be

reviewed was raised, as required by Rule 21.1(h) of the rules of this court. Where the question was not raised in the state court proceedings it is not open in the proceeding on a petition for certiorari. Ellis v. Dixon, 349 U.S. 458, reh. den. 350 U.S. 855.

## CONCLUSION

Petitioner has failed to establish that the Wisconsin Supreme Court has decided an important question of federal law which has not been settled by this court or has decided a federal question in a way in conflict with applicable decisions of this court. Accordingly, the petition for the writ of certiorari should be denied.

Dated at Madison, Wisconsin this 18th day of June, 1985.

Respectfully submitted,

BRONSON C. LA FOLLETTE
Attorney General
State of Wisconsin

LEROY L. DALTON
Assistant Attorney General
State of Wisconsin

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IN SUPREME COURT #83-2101-D

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In the matter of the disciplinary proceeding against;

Larry W. Rader

---

Appellant's Reply to Cross Appeal and Motion to Strike the 1979 private reprimand from the records of this Court.

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Appellant moves to strike the letter of private reprimand dated November 13, 1979 because:

1. The deed was delivered pursuant to a Court Order. (App. 301)

2. Mr. Libman and his wife did not claim any interest in the property described in the deed and in fact did not answer the complaint or appear at the trial. (App. 301-302)

3. The letter was issued under an unconstitutional statutory and/or judicial procedure without a proper hearing and without right of appeal or appellate review. SCR 22.09 and 21.09.

4. The Board of Attorneys Professional Responsibility has

failed to review the wrongful conduct of Mr. Libman and his attorney, which is contrary to SCR 20.36 and 20.35, in imposing an illegal condition of not to record the deed if Karau settled his dispute with Mrs Stroick. (App. 304-305). This is a subversion of the law and contrary to SCR 20.34(3)(c) which states"

> "The civil adjudicative process is primarily designed for the settlement of disputes between parties,..."

5. Judge Keberle asked the parties to settle because of a heavy criminal intake advising he didn't know when the case would start. Karau, to avoid further delay and expense, paid Stroick her expenses of $1200 in return for a deed.

Dated 9/27/84.

Larry W. Rader
Appellant

IN SUPREME COURT #83-2101-D

---

In the matter of the disciplinary proceeding against;

Motion

Larry W. Rader

---

Appellant moves to supplement the appendix to his brief in response because the BAPR reply brief has omitted pertinent documents, and, does conceal data supporting Appellant's claim, to include the attached documents which are referenced, but not included, at pages 202 and 205 of respondent's reply brief. to wit:

Doc. #.

M. Tuchscherer letter to Price dated 7/25/79.
(underlining done by LWR)

O. Rader letter to Price dated 9/4/79. with Karau signature of joinder.

L. Rader letter to BAPR 6/15/79.

F. Rader letter to Price 3/6/79.

H. Price letter to Krueger 5/14/79.

Appellant also requests the Court further take Judicial Notice of the entire BAPR

proceeding as Appellant's request to appear before the Board was denied per the attached letter Price to Rader dated 11/30/79, THAT Price's report to the BAPR at pps 201-205 of respondent's appendix was never made available to Rader until today, October 10, 1984, and the Public interest against such close door proceedings. PRICE in this secret 1979 proceeding before the BAPR made no argument concerning the impropriety of the Libman-Tuchscherer conduct. Such ex parte proceedings are unconstitutional. Patterson v. University Board of Regents 114 Wis. 2d 495, C.A.; affirmed 119 Wis. 2d 570. S.C.

Larry W. Rader, Appellant.
P.O. Box 684, Wausau. WI 54401
715 842 5232

M E M O R A N D U M

TO: Marlene Finley
Supreme Court

FROM: Carol Kornstedt
Board of Attorneys Professional Responsibility

DATE: December 11, 1984

RE: Larry Rader

You have requested the costs incurred by our Board in the above-referenced disciplinary proceedings, and I submit the following:

| | |
|---|---|
| Copying and Postage | $ 40.00 |
| District 16 Expenses | 42.70 |
| Reporter Gary Davis | 804.95 |
| Reporter Sue Ann Klingforth | 299.65 |
| North Central Reporting | 242.50 |
| Counsel Dexter McKelvey | 5,893.84 |
| Referee Rodney Young | 1,797.53 |
| Stenographic work | 47.39 |
| TOTAL | $9,168.56 |

If you have any questions, please let me know.

:clk